

# MAYOR & COUNCIL AGENDA COVER SHEET

## MEETING DATE:

January 6, 2003

## RESPONSIBLE STAFF:

**Mark DePoe, Director**  
**Long Range Planning**

## AGENDA ITEM:

(please check one)

	Presentation
	Proclamation/Certificate
	Appointment
	Public Hearing <b>**Joint**</b>
	Historic District
	Consent Item
	Ordinance
	Resolution
<b>X</b>	Policy Discussion
	Work Session Discussion Item
	Other:

## PUBLIC HEARING HISTORY:

(Please complete this section if agenda item is a public hearing)

Introduced	
Advertised	8/28/2002
	9/04/2002
Hearing Date	9/17/2002
Record Held Open	1/06/2003
Policy Discussion	1/06/2003

## TITLE: Z-294

**Policy Discussion on Map Amendment Z-294 to Rezone a Portion of Parcel 910 (23.3 acres) and Outlot 1B (0.1 acres)**

## SUPPORTING BACKGROUND:

Gary Unterberg, Rodger Consulting, Inc., on behalf of BP Realty Investments, LLC, ("Applicant"), is requesting to rezone a portion of Parcel 910 (23.3 acres) and Outlot 1B (0.1 acres) located northwest of the intersection of MD Route 355 Watkins Mill Road from the I-3 (Industrial Office Park) Zone to the C-2 (General Commercial) Zone.

The Applicant has selected the optional method for the Map Amendment Application, Per Section 24-198 of the Zoning Ordinance and the Applicant has submitted a Schematic Development Plan (SDP) as part of the rezoning application. The SDP proposes approximately 73,000 – 105,000 Square Feet of Office, Service, Retail, Restaurant and Service Station Uses.

The optional method of rezoning is a technique that allows a property to be rezoned with specific covenants and restrictions to the uses and development standards on the land. The SDP limits development standards to less than the maximum permitted and/or limits the land use of the applicant's subject property to one or more of the permitted uses in the requested C-2 zone. The covenants shall indicate in specific language that the subject property is restricted in its use and/or development standards to the SDP and any accompanying or qualifying text material and recorded in the land records of Montgomery County.

The Mayor and Council and the Planning Commission held a joint public hearing on September 17, 2002. On October 28, 2002 the Mayor and City Council held their work session. The Planning Commission, on December 4, 2002, closed their record and forwarded their recommendation of approval to the Mayor and City Council for Z-294.

### Attached:

Exhibit 1: Staff Analysis

Exhibit 2: Communication: Planning Commission

Exhibit 3: Revised Covenant

## DESIRED OUTCOME:

Close the record. Review Covenants. Direct Staff to Prepare Ordinance.

MEMORANDUM TO: Mayor and City Council and the Planning Commission  
FROM: Mark DePoe, Planner  
DATE: November 22, 2002  
SUBJECT: Staff Analysis Z-294, a portion of Parcel 910 and Outlot 1B

**APPLICANT:**

BP Realty Investments, LLC  
10000 Falls Road  
Suite 100  
Potomac, Maryland 20854

**OWNER:**

Betty Brown Casey Trust  
800 South Frederick Avenue, #100  
Gaithersburg, Maryland 20877

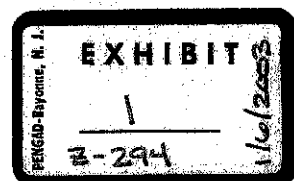
**REQUEST:**

BP Realty Investments, LLC ("applicant"), on behalf of the Betty Brown Casey Trust is requesting a map amendment to rezone approximately 23.4 acres designated as a portion of Parcel 910 east of I-270 and Outlot 1B, in the City of Gaithersburg, from the existing I-3 (Industrial and Office Park) Zone to C-2 (General Commercial). Applicant has selected the Optional Method for the Map Amendment Application, per Section 24-198 of the Zoning Ordinance and the Applicant has submitted a Schematic Development Plan as part of the Rezoning Application.

The optional method of rezoning is a technique that allows a property to be rezoned with specific covenants and restrictions to the uses and development standards on the land. The SDP limits development standards to less than the maximum permitted and/or limits the land use of the applicant's subject property to one or more of the permitted uses in the requested C-2 zone. The covenants shall indicate in specific language that the subject property is restricted in its use and/or development standards to the SDP and any accompanying or qualifying text material and recorded in the land records of Montgomery County.

**LOCATION:**

The subject property ("Property") is located east of Interstate 270 and west of Route 355, and is bounded on the west by Route 355, to the north by P 370 & P 182 (Potomac Electric Power Co.), and to the east by parcel N391 (Colonial Pipeline Co.), Parcels N526 and N417 (Humane Society of the United States), and Interstate 270. The Property is currently bounded



on the south by parcel N860 (IBM Corporation), but will be bounded on the south by the future Watkins Mill Road extended.

#### **TAX MAP REFERENCE:**

Tax Sheet FT 343 and FT 123.

#### **BACKGROUND:**

The subject Tax Parcel 910 has been within the boundaries of the City of Gaithersburg for many decades. By the early 1950's, the property was held by members of the Casey family, who provided land in 1955 for the construction of what is now Interstate 270. This conveyance split the parcel into two, with I-270 running between them.

Outlot 1B is a sliver tract that at one time acted as a service road utilized to provide access to a field on what is now home to the Humane Society of the United States (HSUS) office building. This service road fell into disuse several years ago with the construction of Professional Drive to the HSUS facility.

This Application addresses the portion of Tax Parcel 910 that is east of Interstate 270 along with Outlot 1B ("Property"), both of which have had I-3 zoning in place since at least the 1986 Gaithersburg Master plan.

The Property is the commercial portion of an overall proposed commercial mixed-use development which also contains several office buildings which are currently being processed under Concept Plan CSP-02-001. The Planning Commission held a public hearing on the proposed office building portion of this Mixed-Use development on July 10, 2002 (CSP-02-001), where it was granted Concept Plan Approval with conditions.

The Mayor and Council and the Planning Commission held a joint public hearing for the map amendment application Z-294 on September 17, 2002. The main issues discussed were better pedestrian orientation, a greater mix of uses, clustering of buildings, rezoning to MXD or CD zones, Watkins Mill improvements and traffic impacts. The Mayor and City Council held their work session for Z-294 on October 28, 2002.

#### **EXISTING LAND USE/PHYSICAL CHARACTERISTICS:**

The Property is irregular in shape and is bounded on the east by a public right-of-way (Rt. 355), to the south by a future public right-of-way (Watkins Mill Road) and property owned by IBM, to the north by a public utility line, and to the west by a future public right-of-way (Professional Drive), and office building (HSUS) and a utility industrial use (gas line pumping substation). Currently, the Property is undeveloped and contains a combination of an active agricultural field, open land and forested area. The forested area found on site has been categorized "Mature Oak/Poplar Forest", with no rare or threatened species of plant or trees found on the site.

The slopes range from 0-25% with moderate slopes dominating and steep slopes concentrated near the stream valleys and the associated buffers. The Property drains into the main stem of Great Seneca Creek and its tributaries through a stream that originates on the site and drains primarily to the north. The Natural Resource Inventory (NRI) has established a Stream Valley Buffer which is comprised of stream setbacks, steep slopes and floodplains setback. The floodplains are located within the stream valley buffer.

The soils found on the Property are: Gaila silt loam (1C); Glenelg silt loam (2B); Baile silt loam (6A); and Occoquan loam (17C); and Brinklow-Blocktown channery silt loam (16D). The Brinklow-Blocktown channery silt loam has been identified by the United States Department of Agriculture, Soil Conservation Service as having the potential of being highly erodible. As part of the NRI, specific geo-technical studies were conducted for the soils mapped as 16D, including soils boring test pits, to determine erodibility. The results of the study determined that the 16D soils are not to be considered highly erodible.

The results of the Wildlife Inventory revealed that the site contains the typical array of urban wildlife species. Of the species found, none are unusual or unexpected within this area. The information provided regarding the NRI/FSD (forests, wetlands, floodplains, stream valley buffer, soils, wildlife, etc.) was provided by Rodger & Associates, Inc. and the NRI/FSD study approved August 5, 2002.

#### **PROPOSED USE/ZONING:**

The applicant, BP Realty Investments, LLC, is requesting to rezone approximately 23.4 acres of Parcel 910 (East) and Outlot 1B, in the City of Gaithersburg, from the existing I-3 (Industrial and Office Park) Zone to C-2 (General Commercial). Applicant has selected the Optional Method for the Map Amendment Application, per Section 24-198 of the Zoning Ordinance and the Applicant has submitted a Schematic Development Plan as part of the Rezoning Application. The Schematic Development Plan (SDP) proposes the construction of approximately 90,000-115,000 square feet of restaurants, office, service, retail and service station uses, and this proposal is part of the an overall mixed-used commercial development which also includes several office buildings and currently being processed under Concept Plan CSP-02-001.

The Property is bounded by I-3 (Industrial and Office Park) to the south, Route 355 to the east, R-A (Low Density Residential: PEPCO Lines) to the north, and, I-3 (Industrial and Office Park), MXD (Mixed Use Development) and Interstate 270 to the west.

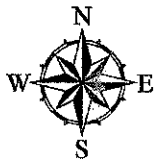
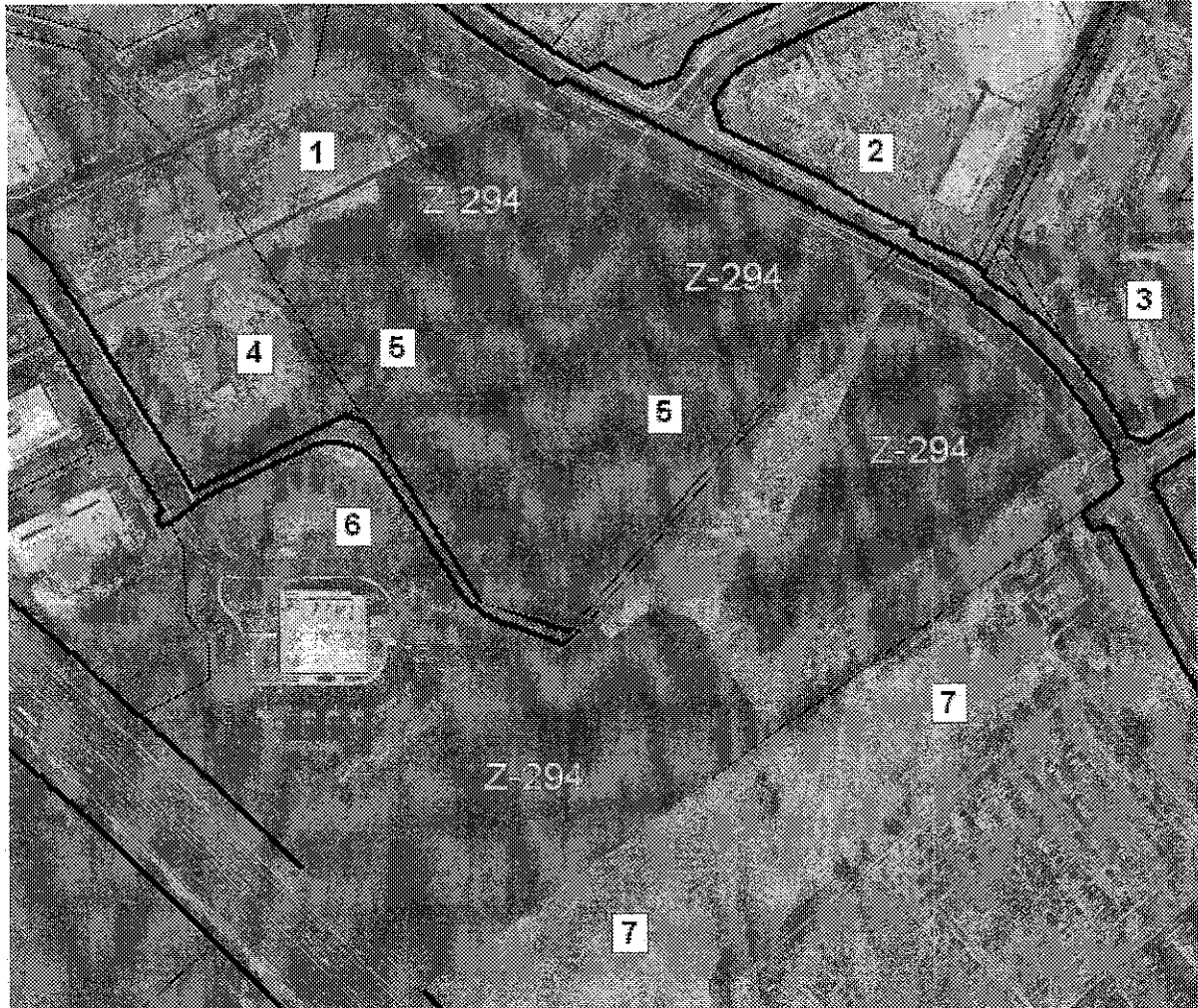
Parcel	Area	Existing Zone
910 (Part)	23.4 acres	I-3 Zone
Outlot 1B	.1 acres	I-3 Zone

#### **NEIGHBORHOOD LAND USE AND ZONING:**

The Property is located within Neighborhood Six, Study Area 3: Map Designation 6 of the Master Plan. The Master Plan designated the parcels as:

“commercial/industrial-research-office, which equates to the Mixed Use development (MXD) Zone. Development of this site for commercial retail facilities could possibly include a hotel; expansion of office and research and development uses would be permitted.” (*Neighborhood 6 Land Use Plan, Pg. 13*)

The 1997 Master Plan for Neighborhood Six adopted the “commercial/industrial-research-office land use designation for the parcels, but never the less retained the site’s I-3 zoning.



- |                                              |                                                |
|----------------------------------------------|------------------------------------------------|
| 1. Zoning: City R-A (Low Density)            | Land Use: Vacant (PEPCO Property)              |
| 2. Zoning: City C-2 (General Commercial)     | Land Use: Commercial (Shopping Center)         |
| 3. Zoning: City R-18 (Medium Density)        | Land Use: Residential (Single-Family Attached) |
| 4. Zoning: City MXD (Mixed Use Development)  | Land Use: Industrial (Colonial Pipeline)       |
| 5. Zoning: City I-3 (Industrial Office Park) | Land Use: Vacant (Proposed Office: CSP-02-001) |
| 6. Zoning: City MXD (Mixed Use Development)  | Land Use: Office (Human Society)               |
| 7. Zoning: City I-3 (Industrial Office Park) | Land Use: Vacant (IBM Property)                |

The Property is also located within the Northern Employment District of the Frederick Avenue Corridor Master Plan. The Corridor Master Plan states that the Property be developed as mixed-use and "uses should include commercial, residential and retail." The plan also requires that the Frederick Avenue Linear Park be continued along the property fronting Route 355. The Frederick Avenue Linear Park is intended to be a passive open space varying in depth and planted with a mixture of plant species. A park easement should be provided from 100' to 200' in width along the western edge of Frederick Avenue. A Secondary path 12'-0" wide shall meander through the "woods".

### **TRANSPORTATION:**

The property fronts onto Route 355 to the east, and abuts I-270 to the west. The Watkins Mill Road extension is part of this application, and will front the property, while the extension of a road to Professional Drive is proposed to be constructed on the western boundary of the property. The Property has approximately 1500 +/- feet of frontage along Route 355 right-of-way and approximately 1600 +/- feet of frontage along the Watkins Mill Road Extended future right-of-way. Access to the site is proposed from Route 355 at both the existing stop lit intersection of Route 355/Travis Avenue, as well as a right in/right out onto Rt. 355 approximately midway between Travis Road and Watkins Mill Road. In addition, access to the site is proposed from Watkins Mill Road approximately midway between Rt. 355 and the future entrance ramp to Interstate 270, utilizing the approved State Highway Alignment. Finally, as noted above, additional secondary access to the site is proposed from the property to Professional Drive through a road extension.

Route 355 is a State roadway and considered a Major Arterial road and has a dedicated right-of-way of that varies from approximately 140-150 feet. Route 355 is currently a six (6) lane road which is approximately 93 feet wide (curb to curb) north of its intersections with both Watkins Mill Road and Travis Avenue.

Watkins Mill Road extended is designed as an Arterial road (major highway), with an approved design from Maryland State Highway requiring a proposed dedicated right-of-way of that varies from approximately 133-165 feet. Watkins Mill Road Extended is designed to be a 6 lane road with up to an additional 3 turn lanes near the intersections with Route 355 and I-270, resulting in a curb-to-curb measurement of that varies from 110-140 feet.

Professional Drive currently is a City road and is designated as a Minor Collector, calling generally for one lane in each direction. The existing Professional Drive varies from 50-70 feet curb-to-curb, and acts as a collector for the Crown Point Office Complex directing traffic to the north onto Route 355. Professional Drive currently terminates at the Humane Society of the United States property, where it becomes a 20 foot private road. A secondary access from the site to Profession Drive is proposed through a road extension of 22 feet curb-to-curb, within the right-of-way of that varies from approximately 30-60 feet.

The Applicant has also submitted a traffic study prepared by The Traffic Group, Inc. The traffic study involved the intersections of Route 355/Game Preserve Road, Route 355/Travis Avenue, Route 355/Watkins Mill Road, Route 355/Christopher Avenue, and Route 355/Route

124. The traffic study concludes that with the addition of the proposed development, the Route 355/Travis Avenue, Route 355/Watkins Mill Road, and Route 355/Christopher Avenue intersections will operate at acceptable levels of service. The traffic study concludes that the Route 355/Route 124 intersection also operates at acceptable levels of service with the exception of its projected operation at an E level of service during evening peak hours. The completion of the Watkins Mill Road Interchange by State Highway is projected by State Highway to alleviate this evening peak hour rush, and return all intersections to a D level of service above. The Traffic Study concludes that the proposed use would generate fewer trips than would be generated if the Property were developed with uses permitted under the existing I-3 zone.

The Department of Public Works, Parks Maintenance & Engineering (PWPME) has asked the applicant to provide an internal circulation study on several occasions. As of the date of this report no such study has been provided. The issues that need to be reviewed by the internal study include:

- 1) **Design of Professional Drive extended** - this is shown as a 26 foot roadway with a 60 foot ROW. The City must still decide on the design of Professional Drive and type of connection to Watkins Mill extended. Staff believes that the design of Professional Drive should be designed to be similar and consistent to what currently exists. In addition, the public road needs to go thru to Watkins Mill extended. The traffic study indicated that this road connection was not a significant peak hour generator. This is not the City's position as we see this road as a direct connection for the traffic on Professional Drive to access the future Watkins Mill Road interchange.
- 2) **Adequacy of storage lanes** - Traffic study indicates that in the PM peak 450 vehicles will exit the site onto Watkins Mill Road. Storage length for this movement is less than 250 feet. The applicant must provide an analysis of the adequacy of the storage length under both existing conditions as well as those conditions that will prevail when Watkins Mill Road and the interchange are complete. It appears that the divided portion will need to be at least 250 feet long.
- 3) **Adequacy of roundabout** - eventually the site access onto Watkins Mill road will need to be signalized. when this happens it is likely that this signalization will negatively impact the roundabout less than 250 feet away. The applicant must provide an analysis of this with the most likely result being the need for the roundabout to be replaced with a different type of intersection design.
- 4) **Adequacy of design for access onto MD 355 opposite Travis Avenue** - Traffic study indicates 285 peak hour left turns from this. Generally this number of left turns would indicate the need for a double left turn at this location. At the very least this will require a storage length of 250 to 300 feet. This storage length should be conflict free from the impact of vehicles attempting to make left turns in and out of pads. This requirement will impact access to buildings N and O and possibility P.
- 5) **Internal Road System** - Under ultimate build out the adequacy of the internal road needs to be confirmed. At present, the internal roads are shown as 2 lane roadways with No Left turn storage provided at any of the intersections. The roundabout near buildings U and V needs to be designed to necessary standards. The entrance for parking structures needs to be relocated away from roundabout to avoid conflicts.
- 6) **External Traffic Study** - The external traffic study traffic numbers for bank generated traffic seems extremely high (315 in and 315 out in peak hour) and should be reexamined.

The traffic study needs to look at for both short term and long term and the roadway network needs to be built to work under both scenarios. The impact of Monument property needs to be addressed as part of this report. We consider the Monument property office project as a potential development that needs to be accounted for in the traffic study as background development. The intersection of MD 355 and Montgomery Village Avenue presently has a critical lane volume of 1430 which does not leave much room until the ceiling of 1450 is reached. The City must further review this intersection and the possibility of increasing this CLV to 1500 under certain conditions. Nevertheless there is limited growth available in this area and two major generators looking to make use of this capacity. There also might be a capacity problem at the MD 355 and Travis Avenue intersection as the CLV for this intersection reaches 1404 with the build-out of this site (not including the impact of Monument) and Watkins Mill Road extended.

**7) Watkins Mill Extended** - A decision needs to be reached on a variety of issues for this extension - who will build, what parts will be built, under what time frame, who will review, who will maintain. Up until this time we have always been under the impression the portion of Watkins Mill Road between the proposed interchange and MD 355 will be developer funded. In the last couple of weeks there have been rumblings that Montgomery County may be considering funding this roadway.

## **STORMWATER MANAGEMENT**

PWPME have reviewed and approved the stormwater concept plan for the Z-294 site as well as the CSP-02-007 plan with the following conditions:

- 1) Groundwater recharge by the use of infiltration must be included on this site. PWPME would suggest the use of roof water for this purpose or you will have to pretreat the water before you put it in the ground.
- 2) The channel protection volume for both proposed ponds needs to be increased as the water quality volume as part of the channel protection volume cannot be counted. The two volumes need to be added together if they are to be stored in the same pond. This will increase the size of both ponds.
- 3) The gabions used to create a forebay in pond #2 will not work unless an impermeable layer is placed within the gabions, as the water will flow through the stones in the gabion basket.
- 4) The outfalls from both proposed ponds need to have the rip rap extended across the stream. Since the outfalls are so close to each other rip rap the stream from the upper outfall to the lower outfall.
- 5) The pipes from the pond on the Colonial Pipeline Company must be tied into proposed pond # 2. This drainage area also must be accounted for in your runoff computations.
- 6) The drainage from the pond below The Humane Society of the United States building must be accounted for in your calculation for proposed pond # 2 as well as showing how you plan to handle this drainage.
- 7) The retaining wall within the ponding area of pond # 2 will need to be designed to handle the fluctuating water levels of the pond.



The final stormwater management design will continue to be worked on by the applicant and PWPME as the process continues for both the Z-294 site as well as the CSP-02-007 plan. The final stormwater design must ultimately be approved by PWPME and Staff prior to the issuance of any on-site or building permits.

### **FOREST CONSERVATION:**

Staff has only completed a preliminary review of the plan for Parcel 910 and Outlot 1B. The following are general comments:

- 1) Forest Conservation Plan- To prevent future record keeping problems, afforestation and reforestation calculations should be performed for Parcel 910 and Outlot 1B only and the Parklands residential and commercials calculations should NOT be considered in this process. The following is a rudimentary calculation, considering only Parcel 910 and Outlot 1B and excluding the area for the Watkins Mill interchange:  
*Approximate net area:* 40.1-10.68 of WM (this acreage is debatable, because some of this area is being used for parking for buildings A and B) = 29.42 acres  
*Approximate existing forest on the net area:* 18.82 acres  
*Approximate cleared:* 13.91 acres  
*Approximate clearance allowed without reforestation* = 10.35 acres  
*Approximate reforestation required under current plan:* 5.18 acres to be performed onsite. The approximate location should be determined.
- 2) It is strongly recommended that additional acres of the existing forest be preserved; especially clusters of specimen trees between the stream valley buffer and the Humane Society. The road, buildings, and parking should be scrutinized to preserve additional trees. Only clearing up to 10.35 acres would eliminate the reforestation requirement.
- 3) The location of specimen trees should be included on the schematic development plan.
- 4) Professional Drive Extended appears to be located on top of a SWM facility (dry pond?).
- 5) What structure will provide SWM for the buildings A and B and their parking?
- 6) The SWM and Building P's parking, drive and dumpster(?) appear to be extremely close to the SVB. Grading within the SVB and retaining walls are not allowed. Dumpsters should not be located near by the SVB to prevent trash impacts.
- 7) Where will the proposed trail be located? There was a discussion about connecting the trail along the SVB with the Watkins Mill? The proposed plan shows only a parking lot in this location; which is not very pedestrian and bike friendly.
- 8) How will the runoff from the three SWM facilities on adjacent properties be handled?
- 9) In general, a more compact design of the restaurant and commercial buildings with additional or larger parking structures is strongly recommended to reduce impervious space and promote a more pedestrian friendly design. In addition, the current design does not appear to provide opportunities for groundwater recharge. Additional practices, such as disconnected rooftops, bioretention, infiltration trench, roofgarden, etc. should be explored.

## STAFF ANALYSIS:

Under Maryland law, the burden of proof in a rezoning requires the applicant to demonstrate substantial change in the character of the neighborhood or a mistake in the original zoning or comprehensive rezoning. [*Agneslane v. Lucas*, 247 Md. 612, 233 A.2d 757 (1967)] In order to meet this burden of proof, one seeking a piecemeal zoning must not merely present some evidence of change in the character of the neighborhood or mistake in the original or comprehensive zoning, but must present evidentiary matter which the courts describe as "strong evidence". [*Heller v. Price George's County*, 264 Md. 410, 286 A.2d 772 (1972)]. In the later case of *Stratakis v. Beauchamp*, 268 Md. 643, 304 A. 2d 244 (1973), "strong evidence" is characterized as sufficient to make the issues "fairly debatable". The Maryland courts have ruled that a more liberal standard is appropriate when a property is being reclassified between similar categories (i.e., a residential use to another residential use, or a non-residential use to another non-residential use), or when the reclassification seeks to improve the use within a jurisdiction's land use hierarchy (eg., from an industrial use to a commercial use). See *Missouri Realty, Inc. v. Ramar*, 216 Md. 442, 140 A.2d 655 (1958), *Chatham Corp. v. Beltram*, 243 Md. 138, 220 A.2d 589 (1966), *Chapman v. Montgomery County Council*, 259 Md. 641, 271 A.2d 156 (1970).

In determining a change in the character of a neighborhood a zoning board is entitled to consider projects that are reasonably probable of fruition in the foreseeable future. *Jobar Corp. v. Rodgers Forge Community Ass'n, Inc.*, 236 Md. 106, 202 A.2d 612 (1964). In addition, changes in the character of the neighborhood should be evaluated as cumulative in determining the aggregate changes in the character in the neighborhood. *The Bowman Group v. Dawson Moser*, 112 Md. App. 694, 686 A.2d 643 (1966). Finally, the requested rezoning must also promote the general welfare of the community. See *Elliott v. Joyce*, 233 Md. 76, 195 A.2d 254 (1963).

Evidence of change or mistake permits, but does not require the legislative body to rezone. *Hardesty v. Dunphy*, 259 Md. 718, 725, 271 A.2d 152, 155 (1970). However, once the legislative body determines that the evidence is sufficient to bring the issue within the realm of "fairly debatable", a court cannot substitute its own judgment for that of the zoning authority. *Scheydt v. Pratt Properties, Inc.* 229 Md. 31, 181 A.2d 464 (1962).

Article 66B Annotated Code of Maryland, Section 4.05 states, "Where the purpose and effect of the proposed amendment is to change the zoning classification, the local legislative body shall make findings of fact in each specific case including, but not limited to, the following matters: population change, availability of public facilities, present and future transportation patterns, compatibility with existing and proposed development of the area, the recommendation of the planning commission, and the relationship of such proposed amendment to the jurisdiction's plan; and may grant the amendment based upon the finding that there was a substantial change in the character of the neighborhood where the property is located or that there was a mistake in the existing zoning classification."

City of Gaithersburg Zoning Ordinance, Section 24-160D.1, states, "This zone and any accompanying development plan(s) may be approved upon findings that the application is proper for the comprehensive and systematic development of the city, is capable of

accomplishing the purposes of this zone, is an internally and externally compatible form of development and is consistent with the applicable master plan, special conditions within such plan relating to the property under consideration, and other applicable planning and land use policies.”

The applicant, through Jody Kline, of Miller, Miller & Canby LLP, has submitted evidence in support of the application to place the issues of error and change within the realm of what he considers “fairly debatable”. This evidence has been in the form of testimony at the initial public hearing, an amended letter in support of its application, and other information that is included in the public record, including evidence of changes in the State Liquor License Legislation, approval of the final alignment of Watkins Mill Road Extended by Maryland State Highway, approval of numerous new office buildings in the neighborhood, a restaurant market study, etc.

### ***IN RESPONSE TO THE MISTAKE IN THE COMPREHENSIVE ZONING ARGUMENT***

Staff concurs that the 1997 Master Plan envisioned the expansion of office and research and development uses to the Property and does not specifically mention the necessary dining amenities to service such uses. Staff feels the 1997 Master Plan should have been clearer as to other uses preferred to service the office uses existing and proposed for this area. However, Staff does not concur that the Master Plan did not allow for restaurant uses. The Master Plan designated commercial/industrial-research-office land uses and recommended rezoning to MXD for the Property. The Master Plan states, “This designation will permit greater zoning flexibility, higher level of design control, and a wider range of uses, particularly along Maryland Route 355.” Staff notes that such services *were* in fact contemplated for this property under its “commercial/industrial-research-office” land use designation, but rezoning of the property to permit such uses did in fact not occur. The applicant believes that even if it had been rezoned to MXD, the State of Maryland’s restrictive liquor licenses would have in all probability worked to effectively bar the restaurants from being developed.

Staff concurs with the applicant in that the I-3 zoned portions of the Property were designated “commercial/industrial-research-office” and should have been rezoned during the 1997 comprehensive rezoning to accommodate a Mixed-Use development. Staff believes that retaining the I-3 zoning for the Property frustrates both the City Council’s ability and the Applicant’s desire to have the property appropriately designed and developed as a quality mixed-use development that was envisioned. Had the recommendation of the 1997 Master Plan to rezone the property to MXD been accomplished, the request to rezone the property today would not have been needed.

Staff concurs that the proposed rezoning will provide both the mix in uses as sought by the Master Plan and better address the needs of the immediate area and City, while providing the City Council the control over the process and outcome that it desires. Staff believes that the rezoning needed to accomplish the intent of the Master Plan can be fulfilled under either the City’s MXD zone, CD zone or the C-2 Optional Method of Zoning requested by the Applicant.

## ***IN RESPONSE TO THE CHANGE IN NEIGHBORHOOD ARGUMENT***

The City has developed and adopted a Master Plan that clearly divides the City into six distinct neighborhoods for land use planning purposes. Staff concurs with the defined neighborhood ("Neighborhood") to include the Neighborhood Six, Study Areas 1-3 and the properties in the County that are adjacent to the Property.

### ***Change:***

The applicant has proposed four main elements that constitute change in the Neighborhood since the 1997 City's Master Plan – (1) the addition and approval of a very significant amount of new office space requiring services, (2) the addition of several hotels of a new type that do not provide services to the Neighborhood outside of their clientele; (3) the revision of the State Liquor license permitting multi-unit restaurant chains to locate in the Neighborhood and serve its and the community's needs; and (4) the approval of the I-270 and Watkins Mill Road interchange.

### ***Addition of significant new Office Projects:***

At the time of the last Master Plan, the Neighborhood had an office base of approximately 1.45 million square feet of offices. Since that time, approximately 350,000 square feet of new office product has been constructed and an additional 1.2 million square feet has received concept plan approval. Staff believes, while the increase in employment density in the Neighborhood is significant, taken alone it does not justify a conclusion of change in the Neighborhood due to the fact that the development was considered and approved in the 1997 Master Plan. The addition of new office space was always contemplated for the Neighborhood and does not constitute a change in the Neighborhood.

### ***Addition of new types of hotels:***

The Neighborhood has also seen the addition of several hotels since the last master plan within the Crown Pointe Office Park. Staff concurs with the applicant that under the 1997 Master Plan for Neighborhood Six, hotels became a permitted use, and their addition would have gone to help provide alternative restaurant dining opportunities to the neighborhood that are commonly found in a limited stay hotel. However, the hotels built were of a new type - an "extended stay" type- that were only then beginning to expand into the region. Staff concurs with the applicant in that unlike other hotels, the extended stay type of hotel does not offer dining services to the balance of the Neighborhood, and often generates additional needs for services and demands on the Neighborhood akin to an apartment use. Staff believes that the addition of this new type of hotel to the Neighborhood (rather than typical limited stay hotels with dining services), while not anticipated in 1997, does not justify independently a conclusion of change in the Neighborhood. The addition of commercial uses, which includes hotels, was always contemplated for the Neighborhood and does not constitute a change in the Neighborhood.

### ***Liquor License Legislation:***

Montgomery County and the City of Gaithersburg have been subject to very restrictive licensing regulations for full service restaurants. These restrictions have effectively precluded multi-unit restaurants from coming into the City and Neighborhood and serving the

community even while populations grew and the desire for an expanded dining selection became acute.

The significant increases in square footage approved for office construction, within the Neighborhood and outside, the addition of increased resident population in the area, along with the construction of other commercial projects without adequate restaurant space has resulted in continually lengthening waits for lunch and evening meals within the Neighborhood and the City as a whole. Despite this fact, the State of Maryland refused to modify the legislation to permit the City to gain relief from this legislation.

The Mayor and City Council members recognized this pressing need and, following the last Master Plan in response to their constituency, fought with great determination and vigor for changes in the State legislation. These efforts, after numerous rebuffs, were successful.

This change has had a most significant impact on the ability to attract national and regional, multi-unit restaurants to the City and Neighborhood to service the neighborhood's and community's needs. Staff concurs with Applicant that the change in the liquor license legislation was not a fact that was known or anticipated at the prior Master Plan, giving the City the ability to service the Neighborhood's and City's dining requirements.

Watkins Mill Interchange:

The Applicant believes that the approval by the Maryland State Highway Administration and Federal Highway Administration of the Watkins Mill Road Extension and Interchange's location constitutes a significant change in the neighborhood. While the Interchange still requires final design, acquisition of land, construction and the related funding of each, the interchange is a priority project at the State, County and City level both to act as a traffic relief for local congestion as well as preventing backups on the I-270 mainline. This project will also provide most of the land required for the eastern half of Watkins Mill Road, and will provide transportation linkages to Professional Drive to the North and the IBM tract to the south – all significant goals of the Master Plan.

The construction and completion of road improvements (Watkins Mill extended, I-270 Interchange and Professional Drive extended) were always contemplated for the Neighborhood and does not constitute a change in the Neighborhood. However, the applicant points out that under *Jobar Corp. v. Rodgers Forge Community Ass'n, Inc.*, 236 Md. 106, 202 A.2d 612 (1964), a zoning board is entitled to consider projects that are reasonably probable of fruition in the foreseeable future in determining a change in the character of a neighborhood.

While there can be little argument that the impending interchange improvement has already set into motion significant changes in the neighborhood (as demonstrated by the approved Monument/IBM office project and the I-3 portion of the property proceeding under CSP-02-001), Staff does not believe that these road improvements, taken alone, justify a conclusion of change in the Neighborhood.

*Frederick Avenue Corridor Development Land Use Plan:*

Maryland Route 355, a major transportation corridor throughout the area, was under review at the time of the last Master Plan and due to time constraints was not incorporated into the 1997 Master Plan. Since that time, the Planning Commission approved Resolution PCR-6-00 to amend the General Plan for Gaithersburg Corridor City *Frederick Avenue Corridor Land Use Plan* MP-3-99 on December 13, 2000. On January 2, 2001, the Mayor and City Council approved Resolution R-4-01 to adopt an amendment to the General Plan for the City of Gaithersburg *Frederick Avenue Corridor Development Land Use Plan* ("Corridor Master Plan"). The Property and adjoining properties fronting on Route 355 were included in the Corridor Master Plan.

The Property and Neighborhood fall within the Northern Employment District of the Corridor Master Plan. The Corridor Master Plan states that the Property be developed as mixed-use and "uses should include commercial, residential and retail." Buildings are intended to be placed along the edges of the site with parking located behind the buildings. The change in development requirements (design, building placement, landscaping, pedestrian orientation, open space, etc.) and proposed uses (residential and retail) along Route 355 and the Neighborhood is a significant change in the Neighborhood and how it will ultimately develop.

*Cumulative Impact of Changes:*

The applicant states that in evaluating change under Maryland law, the changes should be looked at in the cumulative in determining the aggregate changes in the character in the neighborhood. Also, projects that are reasonably probable of fruition in the foreseeable future in determining a change in the character of a neighborhood may be considered. Evidence of change or mistake permits, but does not require the legislative body to rezone.

**POPULATION:**

*Residential Population* - In 1980, the total number of dwelling units in the City was 10,830 and the City population was 26,424. In the most recent study "Dwelling Units and Estimated Population" completed in August 2002, the total number of dwelling units is 21,732 and the City population is 54,770. The City has continued to grow as a residential community.

In 1997, the latest update to the Master Plan, the Neighborhood Six population was 4,238. The January 2001, "Dwelling Units and Estimated Population", showed Neighborhood Six as largely unchanged. The applicant has stated that demographic reports prepared by an independent demographic company indicate a shifting population within the neighborhood to a more affluent and older base, which traditionally dines out more frequently.

*Daytime/employment Population* - The City has seen significant growth/change in its daytime population since the last master plan. As a result, there are significantly greater needs for services to support this daytime growth such as restaurants.

The City of Gaithersburg in 1997, the latest update to the Master Plan, had approximately 10,580,000 square feet of offices/R&D exclusive of the NIST facility, with an estimated daytime employment population of 42,300. By January 2002, office building square footage had increased to 12,590,000 and estimated employment had risen significantly to 50,370,

exclusive of NIST and their recent expansion. During this time few restaurants were added to service the changed demand.

Neighborhood Six in 1997, the latest update to the Master Plan, had approximately 1.45 million square feet of offices/R&D, with an estimated daytime employment population of approximately 5,900. By January 2002, office building square footage had risen to approximately 1.8 million square feet and estimated employment had increased to approximately 7,100. During the same period, virtually no new restaurant seats were added to the Neighborhood.

#### **AVAILABILITY OF PUBLIC FACILITIES:**

Applicant has presented evidence that there are sufficient capacities and availability in the necessary public utilities. The applicant has provided testimony in the form of a Restaurant Study and oral testimony has also been provided that the Neighborhood and City are lacking sufficient restaurant service facilities to properly service the Neighborhood.

#### **PRESENT AND FUTURE TRANSPORTATION PATTERNS:**

The proposed development is currently serviced by Route 355, and has existing stop lit intersections at Watkins Mill Road and Travis Avenue. The development contains most of the right-of-way necessary for the construction of the eastern leg of Watkins Mill Road Extended, and the approved Maryland State Highway design has been incorporated into the proposed project's plans. The Development also has incorporated the master plan recommended minor collector road from the Property to the existing Professional Drive.

#### **COMPATIBILITY WITH EXISTING AND PROPOSED DEVELOPMENT:**

The Property is compatible with and complementary to the existing and proposed development of the area. The site has office and industrial uses to the west, power lines to the north, office uses to the south, and a mix of a shopping center, attached housing and an auto dealer to the east across Route 355. The revised SDP addresses many of the Frederick Avenue Corridor Master Plan design requirements, and now incorporates enlarged building setbacks, additional landscaping, screening and buffering along Route 355 to soften the edge, among other items.

#### **STAFF RECOMMENDATION:**

During the September 17, 2002 Joint Public Hearing, the Mayor, City Council Members and the Planning Commission reviewed the initial plan and commented concerning (1) the need for better pedestrian connectivity between the buildings, (2) the inclusion of retail (possibly a bookstore or theater) in the project, and (3) the placement of a more prominent building on the corner of Watkins Mill Road and Route 355. A subsequent work session was then proposed.

Staff has had the continuing view that the Property is not being developed to Property's full potential. The density of the Property should be increased and the development phased to allow for future infill development of the parking areas. Staff also believes that there must be more of a presence along Maryland Route 355 in the form of 4-6 story office buildings and

that the restaurants should be consolidated and/or incorporated within the first floor of the office buildings and garage structure to create more of the streetscape and pedestrian experience. The larger buildings front Route 355 will serve as a better "street edge" for the corridor than a multitude of one-story individual pad sites.

Currently, the plan shows individual pad sites for the restaurants, banks and general retail uses. The applicant states that they are unable to attract restaurants unless they have an individual pad site, however, the applicant has also pointed out the lack of restaurants within the City and Neighborhood, the need to service existing and future office and has used development examples (i.e. Reston Town Center) which incorporate the restaurants on the first floor of multi-story buildings. Staff believes that restaurants will locate to the area for the exact reasons pointed out by the applicant regardless of providing an individual pad site.

The Applicant, in working with staff, has revised its proposed plan to address the planning concerns raised, including improved pedestrian connectivity, and the placement of a prominent retail building at the corner of Watkins Mill Road and Route 355.

Staff recommends approval of the Applicant's request to rezone the Property under Application Z-294 to the proposed C-2 (General Commercial) zone with the revised Schematic Development Plan (SDP) under the Optional Method of Zoning Development with the following considerations:

*1. Traffic Mitigation:*

a. *Watkins Mill Road:* Watkins Mill Road Extended is a Major Arterial classification roadway in the 1997 Approved and Adopted Gaithersburg Master Plan. The Maryland State Highway Administration (SHA) has completed its alignment selection and approval, which calls for the inclusion of a right-of-way for its programmed 6 lane road from Route 355 to the I-270 interchange. The Applicant, working with City staff, has included the approved SHA right-of-way in the SDP submitted. (As noted earlier, most of this required right-of-way is located within the Applicant's property.) The Applicant shall be required to dedicate the portion of the right-of-way reflected within the attached SDP for the eastern leg of Watkins Mill Road Extended along the property's southern portion;

b. The Applicant shall be required to mass grade its portion of this road to accommodate the future road's alignment. Applicant may utilize the western portion of this future road to stockpile dirt projected to be required in the interchange's construction;

c. The Applicant shall be required to provide storm water management for ½ of this road within its storm water management ponds. Such facilities shall meet the requirements established in the MDE Storm Water Design Manual, to be approved by staff;

d. An additional right-turn lane from Route 355 south onto Watkins Mill Road is ultimately required when the interchange is opened. The Applicant shall be required to dedicate the portion of the right-of-way required for this turn lane;

e. *Collector Road to Professional Drive:* The Applicant shall be required to dedicate a right-of-way along the western edge of its property where it adjoining the Humane



Society of the United State's property as shown on the SDP to accommodate the proposed minor collector road connecting this Proposed development to Professional Drive;

f. The Applicant will also be required to grade and construct said road from the Property to Professional Drive within the right-of-way and to provide storm water management for one-half of this road within its storm water management ponds. Such storm water management facilities shall meet the requirements established in the MDE Storm Water Design Manual, to be approved by staff;

g. The Applicant shall be responsible for the full build-out of Watkins Mill Road extended located on the Applicant's property (Z-294 and CSP-02-001) from Route 355 to the SHA interchange improvements unless other finite arrangements are made for funding and construction. The Applicant shall provide a phasing schedule for the full build-out of Watkins Mill Road extended to be approved by staff;

h. Applicant shall address all Public Works and staff comments and provide an internal traffic study prior to site plan submission to be reviewed and approved by Public Works and staff.

2. Applicant shall submit a Comprehensive Sign Plan package for the development as part of the site plan approval, to be approved by staff;
3. Applicant shall prepare overall exterior architectural guidelines for the proposed development as part of the site plan approval, to be approved by staff;
4. Site plan shall strictly comply with the City's adopted Environmental Standards;
5. Applicant shall address all Forest Conservation comments and obtain final approval by staff;
6. The Applicant shall work with City Staff on the continued refinement of pedestrian linkages between buildings and throughout and around the site. A final pedestrian plan shall be reviewed and approved by staff;
7. The locations of the buildings and parking areas shall be located in such a way to reduce or eliminate the impact to existing trees both in and out of the stream valley buffer area;
8. Applicant shall continue to work with the City staff and other government and non-government wildlife management organizations to develop a wildlife management plan;
9. Applicant shall continue to work with City staff regarding the location of all utilities. If any disturbance within the stream valley buffer is required for utility extension, following construction, the stream channel and aquatic habitat shall be restored to pre-development condition;
10. Applicant shall obtain State Highway approval for access from MD Rte. 355 and for any grading/disturbance of the revertible slope easement along MD Rte. 355 ;
11. Applicant shall address all comments and receive approval from Public Works and Staff regarding concept storm water management prior to submission of preliminary plan application;

12. Applicant shall meet the groundwater recharge requirements established in the MDE Storm Water Design Manual for City Staff approval;
13. The Applicant has proposed two new bus shelter located near the Travis Avenue and Watkins Mill Road entrances to the development, subject to SHA approval. The applicant will work with City Staff to finalize the locations of the bus stops. The bus shelters shall be the City of Gaithersburg prototype.
14. The Applicant shall participate in the Art in Public Places Program by providing public art at key focal points within the proposed community. The applicant will work with City Staff to finalize the number and locations of the Art (minimum of two);
15. This is a Schematic Development Plan and, if approved, the building footprints, building heights, square footage, building locations, access drives, and parking areas should not be considered absolute and are subject to change. Per Section 24-198, the schematic development plan "may be approved or modified by the planning commission at the time of final site plan review."

## COMMUNICATION: PLANNING COMMISSION

**MEMORANDUM TO:** Mayor and City Council

**VIA:** David Humpton, City Manager

**FROM:** Mark DePoe, Long-Range Planning Director

**DATE:** January 2, 2003

**SUBJECT:** Z-294 - BP Realty Investments, LLC,  
Application to rezone a portion of Parcel 910 (23.3 acres) and Outlot 1B (0.1 acres) located northwest of the intersection of MD Route 355 and Watkins Mill Road from the I-3 (Industrial Office Park) Zone to the C-2 (General Commercial) Zone. The applicant has selected the optional method for the map amendment application, per §24-198 of the Zoning Ordinance, and has submitted a schematic development plan as part of the rezoning application. The schematic development plan proposes 73,000 – 105,000 square feet of office, service, retail, restaurant, service station uses.

At its regular meeting on December 4, 2002, the Planning Commission made the following motion:

Commissioner Levy moved, seconded by Commissioner Winborne, to recommend to the City Council APPROVAL of Map Amendment Application Z-294, based on elements of both criteria for rezoning, with the following conditions:

1. Traffic Mitigation:

- a. Watkins Mill Road: Watkins Mill Road Extended is a Major Arterial classification roadway in the 1997 Approved and Adopted Gaithersburg Master Plan. The Maryland State Highway Administration (SHA) has completed its alignment selection and approval, which calls for the inclusion of a right-of-way for its programmed six-lane road from Md. Rte. 355 to the I-270 interchange. The applicant, working with City staff, has included the approved SHA right-of-way in the submitted SDP. (Most of this required right-of-way is located within the applicant's property.) The applicant shall be required to dedicate the portion of the right-of-way reflected within the attached SDP for the eastern leg of Watkins Mill Road Extended along the property's southern portion;



- b. Applicant shall be required to mass grade its portion of this road to accommodate the future road's alignment. Applicant may utilize the western portion of this future road to stockpile dirt projected to be required in the interchange construction;
  - c. Applicant shall be required to provide storm water management for ½ of this road within its storm water management ponds. Such facilities shall meet the requirements established in the MDE Storm Water Design Manual, to be approved by staff;
  - d. An additional right-turn lane from Md. Rte. 355 south onto Watkins Mill Road is ultimately required when the interchange is opened. The Applicant shall be required to dedicate the portion of the right-of-way required for this turn lane;
  - e. Collector Road to Professional Drive: Applicant shall be required to dedicate a right-of-way along the western edge of its property where it adjoins the Humane Society of the United State's property as shown on the SDP to accommodate the proposed minor collector road connecting this proposed development to Professional Drive;
  - f. Applicant shall be required to grade and construct said road from the Property to Professional Drive within the right-of-way and to provide storm water management for one-half of this road within its storm water management ponds. Such storm water management facilities shall meet the requirements established in the MDE Storm Water Design Manual, to be approved by staff;
  - g. Applicant shall be responsible for the full build-out of Watkins Mill Road Extended located on the applicant's property (Z-294 and CSP-02-001) from Md. Rte. 355 to the SHA interchange improvements, unless other finite arrangements are made for funding and construction. The Applicant shall provide a phasing schedule for the full build-out of Watkins Mill Road Extended to be approved by staff;
  - h. Applicant shall address all Public Works and staff comments and provide an internal traffic study prior to site plan submission to be reviewed and approved by Public Works and staff;
- 2. Applicant shall submit a Comprehensive Sign Plan package for the development as part of the site plan approval;
  - 3. Applicant shall prepare overall exterior architectural guidelines for the proposed development as part of the site plan approval;
  - 4. Site plan shall strictly comply with the City's adopted Environmental Standards;

5. Applicant shall address all Forest Conservation comments and obtain final approval by staff;
6. Applicant shall work with City staff on the continued refinement of pedestrian linkages between buildings and throughout and around the site. A final pedestrian plan shall be reviewed and approved at final site plan stage;
7. Buildings and parking areas shall be located in such a way to reduce or eliminate the impact to existing trees both in and out of the stream valley buffer area;
8. Applicant shall continue to work with the City staff and other government and non-government wildlife management organizations to develop a wildlife management plan;
9. Applicant shall continue to work with City staff regarding the location of all utilities. If any disturbance within the stream valley buffer is required for utility extension, following construction, the stream channel and aquatic habitat shall be restored to pre-development condition;
10. Applicant shall obtain SHA approval for access from Md. Rte. 355 and for any grading/disturbance of the revertible slope easement along Md. Rte. 355 ;
11. Applicant shall address all comments and receive approval from Public Works and Staff regarding concept storm water management prior to submission of final plan application;
12. Applicant shall meet the groundwater recharge requirements established in the MDE Storm Water Design Manual for City staff approval;
13. Applicant has proposed two new bus shelter located near the Travis Avenue and Watkins Mill Road entrances to the development, subject to SHA approval. The applicant shall work with City staff to finalize the locations of the bus stops. The bus shelters shall be the City of Gaithersburg prototype;
14. Applicant shall participate in the Art in Public Places Program by providing public art at key focal points within the proposed community. The applicant shall work with City staff to finalize the number and locations of the Art (minimum of two);
15. This is a Schematic Development Plan and, if approved, the building footprints, building heights, square footage, building locations, access drives, and parking areas should not be considered absolute and are

subject to change. In accordance with §24-198, the SDP "may be approved or modified by the Planning Commission at the time of final site plan review";

16. Phasing of development shall be reviewed and approved by the Planning Commission; and
17. Covenant shall be recorded after City Attorney approval in accordance with 24-198B.

Vote: 3-0 (Absent: Commissioners Hicks and Keller)

## DECLARATION OF COVENANTS

THIS DECLARATION OF COVENANTS is made this \_\_\_\_\_ day of \_\_\_\_\_, 2003 by BP Realty Investments, LLC ("DECLARANT").

### WITNESSETH:

WHEREAS, the Code of the City of Gaithersburg, Maryland provides in Section 24-198 (Zoning Ordinance) for an optional method of application for local zoning map amendments in which an applicant may limit a development standard to less than the maximum permitted in a requested zone, or the applicant may limit the land use of the property to be rezoned to less than all of the uses permitted in the requested zone; and

WHEREAS, DECLARANT has submitted to the City of Gaithersburg a local map amendment zoning application seeking C-2 zoning for a parcel of land located within the boundaries of the City of Gaithersburg ("Subject Property") identified on Exhibit A attached hereto and incorporated herein by reference, said zoning application having been designated by the City of Gaithersburg as Zoning Application No. Z-294; and

WHEREAS, it is the intention of DECLARANT in Zoning Application No. Z-294 to limit the development standards and the land uses of the C-2 zone for the Subject Property to less than the maximum permitted in the C-2 zone; and

WHEREAS, Section 24-198(b) of the City Zoning Ordinance requires the filing with a zoning application under the optional method of development of a covenant specifying the manner in which the property to be rezoned is to be restricted in its development standards or use, and that such application include language that the Property shall be restricted in its use and/or development standards to the schematic development plan and accompanying or qualifying text materials submitted with such plan, as such plan may be approved or modified by the Planning Commission at the time of the final site plan review;

NOW, THEREFORE, in consideration of the foregoing recitals, each of which are hereby incorporated in and made a substantive part of this Declaration, DECLARANT hereby enters into this Declaration of Covenants for the purposes stated above and declares that the Subject Property shall be developed subject to the following restrictions:

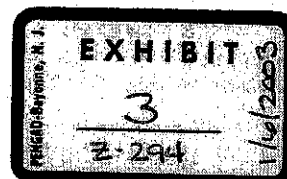
### ARTICLE I

#### DEVELOPMENT STANDARDS

The Subject Property shall be constructed at less than the maximum standards permitted in the C-2 zone as of the date of rezoning of the Subject Property as specified below:

1. Retail Building Height -- Retail building height shall not exceed forty (40) feet in height (not including belfries, chimneys, cupolas, domes and the like which are excluded from height control by Section 24-165 of the City), but in no event will any such structure exceed 60 feet in height.

Deleted: Code (Zoning Ordinance) but in no event will any such structure exceed 60 feet in height



2. Office Buildings Height -- Office buildings height shall not exceed sixty (60) feet in height;
3. Structured Parking Facilities Height -- Structured parking facilities shall not exceed fifty (50) feet in height;
4. Floor Area Ratio -- Floor area ratio measured on the entire Subject Property shall not exceed 0.45;
5. Yard requirements -- Yard requirements will be as shown on the Schematic Development Plan, as such plan may be approved or modified by the Planning Commission at the time of final Site Plan review.

ARTICLE 2  
LIMITATIONS ON USE

The Subject Property shall be used subject to the following restrictions:

Uses permitted on the Subject Property shall be those uses permitted by right or by special exception in the C-2 zone as it exists as of the date of rezoning of the property to the C-2 zone, or all uses by right or by special exception that may be thereafter added to the C-2 zone, except the following:

1. Bowling alley,
2. Amusement park,
3. Massage parlor or any facility which sells or displays obscene or pornographic materials or services, the display of pornographic films (including those rated X, XX, or XXX or substitute designation or unrated films which are also shown at so called 'adult' movie theaters, it being understood that NC-17 shall not be deemed the equivalent of the "X" rating),
4. Any facility which sells cars, boats, trailers, or mobile homes, truck and transport vehicle, farm equipment and marine equipment,
5. Flea market, carnival, or any discount thrift or second-hand shop (the foregoing would also exclude a first class antique shop or upscale resale store),
6. Sporting event or sports facility,
7. Any Video parlor of more than 500 square feet of video games or other game parlor,
8. Internet cafe,
9. Trailer park,
10. Any facility that offers off-track betting facility,
11. Any store which utilizes for the display and sales of retail merchandise more than 25,000 square feet of floor area;
12. Lodges and recreational buildings,
13. Any animal hospitals, animal boarding places and pet shops,
14. Funeral home,



15. Fire stations,
16. Bed and breakfast establishment,
17. Extended stay lodging establishment,
18. Dwelling units which are part of buildings intended for commercial use,
19. Drive-in theaters, and
20. Any facility that offers automobile painting and/or automotive body repairs.

ARTICLE 3  
RESTRICTIONS AND LIMITATIONS

1. The restrictions and limitations set forth herein shall only become applicable and binding upon the effective date of the rezoning of the entire Subject Property to the C-2 classification and the approval of the Schematic Development Plan and related conditions agreed upon. These restrictions and limitations shall then remain in effect thereafter until a) any part of the Subject Property is subsequently rezoned, or b) this Declaration of Covenants is modified with the approval of the City of Gaithersburg.

2. Representatives of the city shall have the right to enter the subject property for the purposes of inspection and insuring compliance with the terms of Articles 1 and 2 of the Declaration of Covenants. Any violation of these Covenants may result in revocation or suspension of any building or use in occupancy permit for the subject property.

3. These restrictions shall be perpetual and shall run with the land and be binding on Declarant and all heirs, successors and assigns.

IN WITNESS WHEREOF, DECLARANT has hereunto set its hand and seal the date first above written.

Witness:

BP REALTY INVESTMENTS, LLC.

By \_\_\_\_\_

STATE OF MARYLAND, COUNTY OF MONTGOMERY, to-wit:

ON THIS \_\_\_\_\_ day of \_\_\_\_\_, 2002, before me, the undersigned officer, personally appeared \_\_\_\_\_, for BP REALTY INVESTMENTS, LLC, known to me to be the person whose name is subscribed to the foregoing, and being authorized so to do, executed the same as the act and deed of BP REALTY INVESTMENTS, LLC, for the purposes therein contained.

WITNESS my hand and official seal the same day and year first above written.

\_\_\_\_\_  
Notary Public

My Commission expires: \_\_\_\_\_